No. 14,505

IN THE

United States Court of Appeals

For the Ninth Circuit

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,

Appellant,

vs.

FIDALGO ISLAND PACKING CO.,

Appellee,

CLARA WILSON,

Intervenor.

Appeal from the District Court for the District of Alaska, Division Number One.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William Healy, James Alger Fee, and Richard H. Chambers, Judges of the United States Court of Appeals for the Ninth Circuit, who constituted the Court in the original hearing:

The appellant above-named presents this, a petition for rehearing in the above-entitled cause and in support thereof respectfully submits the following:

The Court's per curiam opinion, in the opening sentence thereof, states that, "this is an extremely confusing case."

Counsel for the appellant lived with this case for over two years and can, therefore, sympathize with the Court's bewilderment in attempting to decide whether the District Court erred in nullifying the administrative regulation involved herein. Apparently, due to the confusing state of the record, this Court reasoned that the most equitable course to follow would be to affirm the District Judge's decision on the theory that a presumption of lawful exercise of authority surrounds the acts of the courts of general jurisdiction "which is not enjoyed by administrative agencies." A careful reading of the opinion seems to indicate that this presumption tipped the scale in favor of the District Court's decision as against the contentions of the administrative agency.

The appellant feels that, in all fairness, the Court should exercise its discretion and grant a rehearing in order that he may have an opportunity to clarify some of the confusion which exists in the Court's mind. During oral argument, only one or two short questions from the bench were directed to counsel for the appellant which were answered to the apparent satisfaction of the Court. From all external indications the Court at no time evidenced confusion over the case. It appears that only subsequent to oral argument and after the Court retired did the case become confusing. Under these circumstances, because of the vital importance of this case to the people of the Ter-

ritory of Alaska as a whole and the possibility that serious mistakes of law and fact made by the District Court will be affirmed due to a confused record, the appellant very earnestly appeals to the Court's sense of fairness and sincerely requests an opportunity for a rehearing in order to re-present the case in as simple and forthright a manner as possible.

It is hoped that if a rehearing is granted, the ultimate decision will be rendered only after a thorough and complete understanding of all facets of the case and will, therefore, afford substantial justice to all concerned. It is most deeply felt that if the Court insists on adhering to its initial decision, in the face of its frank admission that the case is confusing, without affording the appellant the opportunity to clarify this confusion, bad law and a miscarriage of justice will surely result.

Set forth below are the specific grounds for this petition which the appellant feels supports its contention that, owing to a confused record and an inadvertent failure of the Court to consider matters referred to in appellant's brief and alluded to in oral argument, the Court has based its decision upon a wrong principle of law and therefore, serious doubt exists as to its correctness.

I.

THE ALASKA EMPLOYMENT SECURITY COMMISSION WAS IN EXISTENCE AT THE TIME REGULATION NO. 10 WAS PROMULGATED.

In stating in its opinion: (1) that the Employment Security Commission was no longer in existence at the date of the issuance of the regulation, and (2) that the facts found by the Trial Court establish that it is impossible to show that the administrative agency had jurisdiction over the subject matter or persons this Court failed to consider:

> *The doctrine of simultaneous repeal and re-enactment set forth under Point 1, Issue II of Appellant's Brief, and*
>
> *The rule that findings of a Trial Court are not conclusive but must have some evidentiary support in the record.*

The Doctrine of Simultaneous Repeal and Re-Enactment.

The Doctrine of Simultaneous Repeal and Re-Enactment simply stated, is that where a statute is repealed and all or some of its provisions are at the same time re-enacted, the re-enactment is considered an affirmance of the old law and the provisions of the repealed act continue in force without interruption.[1] *Bear Lake v. Garland et al.,* 164 U.S. 1, 11-12;

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[1]An additional consideration is the fact that the Territory has a general savings statute which reads as follows:

"19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but

50 Am. Jur., *Statutes,* Section 533; 82 C.J.S. *Statutes,* Section 295; *Commissioner of Internal Revenue v. Emery,* 62 Fed. (2d) 591, 592; *Goublin v. U.S.,* 261 Fed. 5, 10-11, (CCA 9th); *Sutherland on Statutory Construction,* 2nd Edition, Section 238.

This Court in the *Goublin* case, supra, at page 11, quotes with approval Professor Sutherland's statement of the rule:

> "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time * * * the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. * * * *Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away,* * * * by such repeal and re-enactment of the law on which they respectively depend." (Italics supplied.)

The Supreme Court in *Cambell v. California,* 200 U.S. 87, 92 (also cited in the *Goublin* case) stated the same rule in this manner:

> "* * * the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, * * *"

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the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made.

Applying the above stated rule to the case at hand, the conclusion is inescapable that since both the statute which abolished the old Commission (Chapter 82, SLA 1953) and the statute which created the new one (Chapter 83, SLA 1953), are virtually identical in language and form and both were enacted within minutes of one another,[2] the simultaneous rule becomes operative and it must be held that there existed a continuity of Commissions. As Professor Sutherland states when applying the rule:

> "Offices are not lost, corporate existence is not ended, * * * statutory power is not taken away, * * *."

Therefore, it appears that the Trial Court's Finding No. 10 to the effect that no commission was in existence at the time of the promulgation of the Regulation No. 10 is clearly erroneous and not supported by the evidence.

In view of this, the 1938 delegation of authority by the Commission (R. 161 & 162) to its Executive Director, to promulgate rules and regulations[3] constitutes prima facie authority for the issuance of Regulation No. 10 on June 29, 1953. It necessarily follows that the Trial Court's Finding No. 11 to the effect that Mr. McLaughlin had no power or authority to issue said Regulation on June 29, 1953 is also clearly erroneous and not supported by the evidence.

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[2]These statutes should be compared. Both are set out in Appendices "E" and "F", Appellant's Opening Brief.

[3]This delegation is expressly authorized by Section 51-5-1(f) ACLA 1949. This statute is set forth in Appendix "B", Appellant's Opening Brief.

Based on the premise that on June 29, 1953 there was a Commission in existence and that McLaughlin exercised a lawful delegation of authority in promulgating Regulation No. 10, it is inescapable that the Appellee and Intervenor have no standing in Court, let alone the right to a permanent injunction, because:

Neither one has exhausted the administrative remedy provided in Chapter 99, SLA 1953 and

The record contains not one scintilla of evidence in support of the Trial Court's finding that the Appellee and Intervenor were irreparably injured by the enforcement of the regulation.

Exhaustion of Remedies.

If the Court applies the rule of simultaneous repeal and re-enactment, there is then at least a presumption of validity clothing the director's issuance of the disputed regulation. Since the Appellee and Intervenor did not exhaust their administrative remedies set forth in Chapter 99, SLA 1953, they should both be denied recourse to the courts as expressly stated in Section 51-5-7 (h) and (i) ACLA 1949.[4] (See Issue

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[4]Sec. 51-5-7(h) and (i) ACLA 1949 reads as follows:

"Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final 30 days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. * * *"

"Within thirty days after the decision of the Commission has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the United States District Court against the Commission for the review of such decision, in which action any other party to the proceeding

II of Appellant's Opening Brief. Cf. *Phelps Dodge Corporation v. Labor Board,* 313 U.S. 177, 196-197; *Unemployment Compensation Commission of Alaska v. Aragon,* 329 U.S. 143, 153-155.) Further stress is laid upon the rule, developed under Issue II, page 26, of Appellant's Opening Brief, that regardless of an allegation that the agency has no jurisdiction or has acted without authority, a person attacking an administrative order must nevertheless *first* exhaust all administrative remedies. *Myers v. Bethlehem Shipbuilding Co.,* 303 U.S. 41, 50, 51; 42 Am. Jur., *Public Administrative Law,* Section 200, P. 201.

Evidence in Support of Trial Court's Findings.

It is basic that if the record is completely devoid of evidence to support the findings of fact, the findings are "clearly erroneous" and judgment cannot be upheld on appeal. Rule 52 (a) F.R.C.P.; *U.S. v. Gypsum Co.,* 333 U.S. 364, 395; *U.S. v. Oregon State Medical Society,* 343 U.S. 326, 329; *Alaska Freight Lines v. Harry,* 220 Fed. (2d) 272, 275; *Jones Nat. Bank v. Yates,* 240 U.S. 541, 553; 3 Am. Jur., *Appeal and Error,* Section 1656 (i).

The following specific findings of fact made by the Trial Court which findings this Court accepted and based its decision of affirmance upon, have no evidence to support them in the record:

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before the Commission shall be made a defendant. * * * In any judicial proceeding under this Section, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said Court shall be confined to questions of law. * * *"

1. Finding No. 10:

> "That at the time purported amended Regulation No. 10 was attempted to be promulgated and declared to be in force, the former Employment Security Commission had been abolished and the new Commission had not yet come into existence and had not met at the time this action was instituted, and they did not meet until August 6, 1953, and there was no Commission in existence to which an appeal could have been taken from purported amended Regulation No. 10."

In the Trial Court's opinion (R. 42, 48), it emphatically rejected the Appellant's contention that there was no Commission in existence at the time Regulation No. 10 was issued:

> "On the other hand, the plaintiff and intervenor contend that the authority delegated to the defendant expired with the abolition of the Commission by Chapter 82, that there was no Commission to appeal to until August 6th, when it met for the first time, * * *."

After disposing of a preliminary argument submitted by the Appellant, the Court had this to say about the existence of the Commission:

> "* * * The remaining contentions are in my opinion untenable for, apparently, *the new members of the Commission had qualified,* and in any event an appeal may be prosecuted although the appellate tribunal is not in session." (Emphasis added.)

Though the generally accepted rule is that the Court's findings prevail over its opinion the Supreme

Court has ruled that the Appellate Court may look to the opinion as an extrinsic aid in resolving ambiguities. In *American Propeller Co. v. U.S.,* 300 U.S., 475, 479-480, the Court enunciated this rule:

> "While it is true that this Court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings, the rule is not absolute and does not preclude reference to the opinion for all purposes whatsoever. It is well established that in case of ambiguity, extrinsic aid may be sought in order to settle the meaning of a statute or a contract. We see no reason why the principle of that rule does not permit reference to the opinion of the Court in order to clarify the meaning of a finding otherwise in doubt."

The application of this rule may well clarify the confusion in this case. Counsel for Appellee personally prepared the findings after the Court issued its written opinion. The custom in Alaska is that counsel prepares the findings which are based upon the opinion and the Court signs the same in a very perfunctory manner. However, the Court personally writes its own opinions. The conclusion in the Trial Court's opinion that there *was* a Commission in existence is based upon the undisputed fact in the record that the new Commission had qualified. (Defendant's Exhibit "C", R. 163.) The Trial Court frankly admitted the existence of a Commission at the time Regulation 10 was promulgated but declared the regulation void on the theory that McLaughlin acted pursuant to a delegated power which was non-delegable in nature and hence could only be exercised by the Commission.

(R. 49 and 50.) But Appellant has shown that the power to subscribe seasonal periods for *previously classified* employers is a delegable power and as a matter of fact it would be virtually impossible for the agency to operate were it not delegable and the Commission had to exercise it itself. (See Issue II, pp. 28-35 of Appellant's Opening Brief.)

2. Finding No. 11 states:

> "That former Acting Director McLaughlin had no power or authority on June 29, 1953, to promulgate any regulation affecting seasonal employment in the Territory, or any other regulation of the Commission, and such authority as might have been delegated to him at one time under the old Commission did not exist on June 29, 1953, and could not be exercised on or after that date. The purported amended Regulation No. 10 is, therefore, void and no appeal to the Commission is necessary and no pursuit of any administrative remedies was necessary to attack the validity of pretended amended Regulation No. 10 and no appeal to any administrative body is required from an invalid order made by one without authority."

The erroneous conclusions in this finding, broken down for analysis, are as follows:

(a) That McLaughlin had no authority or power on June 29, 1953 to promulgate or issue any type of regulation,

(b) That any authority delegated to McLaughlin by the old Commission expired when the repealing statute, Chapter 82, SLA 1953, was enacted.

(c) Based on (a) and (b) above, Regulation No. 10 was void and no appeal therefrom is necessary.

The conclusions in Finding No. 11 must, by necessity, be erroneous if this Court, like the Trial Court, applies the simultaneous repeal and re-enactment doctrine and thereby recognizes the continual existence of the Commission.

3. Finding No. 6 states:

"That neither the former Acting Director McLaughlin nor the Employment Security Commission of Alaska had, prior to June 29, 1953, or at any other time, made any classifications of seasonality in employment in the Territory, except those attempted to be made by purported amended *Regulation No. 10, which attempted to apply seasonality to the salmon canning industry as an industry.* No other industries or employers have been classified as seasonal." (Italics added.)

The italicized provision of this finding is manifestly erroneous. A cursory examination of the regulation itself, discloses that it merely prescribes seasonal periods *"for certain employers engaged in the canning of salmon* * * *." It does not prescribe "seasonality" for the employer since the determination of seasonality, a previous separate and distinct act, (not a regulation) was accomplished by notification, in writing, to certain employers of their seasonality status. This written classification was subject to appeal to the full commission. (See Defendant's Exhibit "B".)

4. Findings 12, 17 and 18:

Insofar as these findings state that Appellee and Intervenor have been or are threatened with irreparable injury to themselves, they are erroneous for the reason that nowhere in the record is there one scintilla of evidence in support thereof.

II.

APPELLEE AND INTERVENOR HAD NO LEGAL CAPACITY TO SUE.

This Court, in stating that "any persons having a legal interest and suffered injury by threatened enforcement would be entitled to have judicial restraint placed upon those presuming to act upon it," appeared to give no consideration to Points 3 and 6 under Issue I of Appellant's Opening Brief. These points substantiated by the record and competent authority force one to conclude that the Appellee and Intervenor, since neither were irreparably injured by the enforcement of the regulation but on the contrary were benefited thereby, did not have a legal interest upon which to sue and in no event were they entitled to an injunction since neither suffered irreparable injury. Cf. *Sheldon v. Griffin,* 174 Fed. (2d) 382, 384 (CCA 9th); *Jeffrey v. Blagg,* 235 U.S. 571, 576; *Hess v. Mullaney,* 213 Fed. (2d) 635, 640; *Sheldon v. Wade,* 130 Fed. Supp. 212 (Alaska).

III.

THE COURT'S RULING THAT JURISDICTION OVER THE SUBJECT MATTER AND PERSONS MUST BE PLEADED AND PROVED BY THE ADMINISTRATIVE AGENCY, IS CONTRARY TO DECISIONS BY THE UNITED STATES SUPREME COURT.

In ruling, in effect, that "Jurisdiction of the subject matter and persons must be pleaded and proved by the Administrative Agency promulgating the regulation," the Court failed to consider:

(1) the presumption of validity attaching to all administrative regulations which thereby imposes the burden of proof on the persons attacking the regulation and

(2) the fact that in this case the Executive Director representing the agency is a party-defendant and therefore, has no occasion to plead and prove jurisdiction.

Presumption of Validity.

By ruling that the administrative agency must "plead and prove jurisdiction over the subject matter and persons this Court's ruling is in direct conflict with decisions of the United States Supreme Court and other Courts of Appeal. The United States Supreme Court in *Pacific States Box and Basket Co. v. White,* 296 U.S. 176, 185, 80 L.ed. 138, 146, laid down the following rule of law which appears to be directly contrary to that rule enunciated by the Court herein:

> "When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presump-

tion of the existence of that state of facts, * * * It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation.' *The contention is without support in authority or reason, and rests upon misconception.* Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. (Cases cited.) But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. (Cases cited.)" (Italics supplied.) Cf. *U.S. v. Chemical Foundation,* 272 U.S. 1, 14, 15.

The magnitude of this Court's ruling must be fully realized. It wipes away the presumption of validity attaching to all regulations passed by an administrative agency. In *State Corporation Commission of Kansas v. Wall,* 113 Fed. (2d) 877, 880 (CCA 10th), the Court stated:

> "* * * Where an administrative board acts within the line of its official duties, its orders are presumed to have been regularly, properly, and legally made."

Decisions of other Courts of Appeals which hold contrary to this Court's ruling are *Continental Distilling Company v. Humphrey,* 220 Fed. (2d) 367, 371 (C.A.D.C.); *U.S. v. Obermeier,* 186 Fed. (2d) 243, 247 (C.A. 2nd); *U.S. v. Johnson,* 87 Fed. (2d) 155, 157 (C.A. 10th). See 42 Am. Jur. *Public Administrative Law,* Section 240; *Procter and Gamble Co. v. Coe,* 96 Fed. (2d) 518, 521 (C.A. D.C.).

A final point not considered by this Court is the conclusive effect that Section 51-5-7 (i) ACLA 1949 gives to findings of the Commission. See Footnote 4 (supra).

The Executive Director and the Administrative Agency Are Party-Defendants Herein.

In stating that the burden is on the administrative agency to "plead and prove jurisdiction over the subject matter and persons", the Court apparently failed to consider the fact that the Executive Director, representing the agency, is the party-defendant herein. As such, he was only required to answer the complaint and was under no legal duty to affirmatively plead and prove jurisdiction. See 73 C.J.S., *Public Administrative Bodies and Procedure,* Section 104 (c) and Section 267.

An examination of paragraphs one and seven of Appellee's Amended Complaint (R. 3, 11-12) clearly

discloses that the Appellee alleged the necessary jurisdictional facts to give the Commission jurisdiction over "the subject matter and persons" herein. Paragraph one states that the Appellee is "engaged in the fishing, packing, canning and shipment of canned salmon at Ketchikan, Pillar Bay and Cook Inlet, Alaska,". By this allegation plaintiff is an "employing unit" within the definition of Section 51-5-1 (g) ACLA 1949,[5] and therefore, the Commission has jurisdiction over "the subject matter" (seasonality) and "persons" (plaintiff corporation as an employing unit). Furthermore, paragraph seven of the Amended Complaint alleges that the Executive Director lacked authority to promulgate the subject regulation. By making this allegation, the Appellee took upon itself the burden of proving said lack of authority to issue the regulation. It is extremely difficult to understand how this Court in the face of the above considerations, can now hold: (1) that the burden is on the administrative agency, as a party-defendant, to plead and prove jurisdiction of the subject matter and persons, and (2) that such jurisdiction does not exist since it has been alleged to exist by the plaintiff-appellee.

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[5]Section 51-5-1(g) states in part as follows:

"'Employing Unit' means any individual or type of organization, including any * * * corporation, whether domestic or foreign, * * * which has, or subsequent to January 1, 1937, had, in its employ one or more individuals performing services for it within this Territory. All individuals performing services within this Territory for any employing unit which maintains two or more separate establishments within this Territory shall be deemed to be employed by a single employing unit for all the purposes of this Act. * * *"

IV.

CRIPPLING EFFECT OF DISTRICT COURT'S DECISION.

The Court apparently has not considered the fact that the District Court's decision has the practical effect of virtually crippling the Unemployment Compensation Fund of the Territory.

Pursuant to stipulation of counsel, the Trial Court signed an order impounding $650,000.00 of Unemployment Compensation Funds pending the outcome of this litigation. (R. 72.) The major portion of these monies will be disbursed in the event an ultimate appellate decision does not set aside what we consider to be an erroneous District Court ruling that the regulation is void.

The vital significance affixed to the outcome of this litigation is apparent to all persons who are interested in preserving the solvency of Alaska's Unemployment Compensation Fund. In view of the very critical condition of this Fund it is sincerely felt that the Court should grant a rehearing and then render its decision in an atmosphere devoid of confusion. To affirm the Trial Court's decision in the air of confusion which surrounds this litigation, most surely will result in a miscarriage of justice.

V.

SUBSEQUENT LEGISLATIVE ENACTMENTS DID NOT EFFECT THIS LITIGATION.

The last sentence of the Court's opinion which is a statement to the effect that subsequent legislative developments have left in this Court's mind "no doubt of the validity of the result," is indeed perplexing.

The Appellant is not exactly sure what subsequent legislative events the Court is alluding to but if it means that legislation pertaining to any issue in this litigation has been enacted which would support a decision that Regulation No. 10 is void, the Court has been misinformed. There have been only two legislative enactments pertinent to the subject matter of this case: One is the recent Federal Statute[6] which authorizes the Alaska ESC, notwithstanding restrictions in Alaska's Organic Act, to borrow money from the Federal Government to replenish the Territory's

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[6]Public Law 56 84th Congress approved by the President June 1, 1955, reads as follows:

"That the Governor of Alaska is authorized and empowered, notwithstanding any provision of the Organic Act of Alaska, or any other Act of Congress, or any of the Territorial laws, to the contrary, to obtain from the Federal Unemployment Fund, established pursuant to the 'Employment Security Administrative Financing Act of 1954' (Public Law 567, Eighty-third Congress, approved August 5, 1954), and subject to the conditions in said Act, such advances as the Territory of Alaska may qualify for and as may be necessary to obtain for the payment of unemployment compensation benefits to claimants entitled thereto under the Alaska employment security law: *Provided,* that the general fund of the Territory of Alaska from which advances have been made for the payment of unemployment compensation benefits shall be reimbursed from advances made through the Governor of Alaska from the Federal Unemployment Fund."

depleted Unemployment Compensation Fund.[7] The other was the enactment by the Territorial Legislature of Chapter 5, Extraordinary Session Laws of Alaska, 1955 which statute in substance, is a recompilation with minor additions, of the Territory's previous Employment Security statute. Chapter 5 effectuated no far-reaching substantive changes in Alaska's employment security law and in no conceivable way is its enactment relevant to the issues in this litigation.

CONCLUSION.

The Court is most respectfully requested to grant a rehearing for the reasons above set forth.

Dated, Juneau, Alaska,
October 5, 1955.

J. GERALD WILLIAMS,
Attorney General of Alaska,
By: EDWARD A. MERDES,
Assistant Attorney General,
Attorneys for Appellant and Petitioner.

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[7]Shortly after the enactment of the Federal Statute, the Territory borrowed approximately $2,000,000.00 from the Federal Government to replenish its depleted fund.

Certificate of Counsel

I, Edward A. Merdes, attorney for Appellant, do hereby certify that the foregoing petition for a rehearing of this cause is well founded and is presented in good faith and not for purpose of delay.

Dated, Juneau, Alaska,
October 5, 1955.

Edward A. Merdes,
Assistant Attorney General,
Of Counsel for Appellant and Petitioner.